

The 'Striani case': UEFA's 'break-even rule' & EU law

On 6 May, Belgian Player Agent Daniel Striani lodged a complaint alleging that UEFA's Financial Fair Play regulations infringe EU law. Alexandre Miguel Mestre, Of Counsel at AAMM, Abecasis, Azoia, Moura Marques & Associados and former Portuguese Secretary of State for Sport and Youth, examines whether this is the case.

We do not know the text of the complaint lodged by the FIFA agent Daniel Striani. We are only aware of the reasoning of his lawyer, Jean-Louis Dupont¹. An exhaustive analysis of all the legal issues that could arise from this case would not fit into a short article like this. This article merely consists of listing some arguments in opposition to the majority view which sustains the illegality of the system in question².

The arguments we are going to list serve to defend the Financial Fair Play Regulations (FFP) in general and the Break Even Rule (BER) in particular³, continuing with 'overriding reasons of general interest', thus justifying restrictions to fundamental liberties, namely the free movement of people and capital and free provision of services. They are arguments that could also support the fulfilment of the conditions of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), or an objective justification under Article 102 TFEU. They also might help to frame the 'overall context' in which the FFP rules were created and to ascertain if the restrictions caused are inherent in the pursuit of the objectives; i.e. contribute to assess if the rules fall outside Articles 101(2) and 102 TFEU, further to the Wouters⁴ judgment. They are also arguments to ponder in the assessment of the proportionality of the measures in question, in the

ambit of fundamental liberties and competition rules.

Article 165 TFEU

There are two passages in Article 165 TFEU which should be invoked here. Firstly, where it alludes to the 'specific nature of sport'. Linking paragraphs 30 and 47 of Advocate General Sharpston's Conclusions⁵, in close articulation with paragraph 40 of Oliver Bernard's judgment⁶, from Article 165 TFEU we recognise a specificity of football and even a specificity of professional football, which demands a mitigated application of EU law.

Article 165 TFEU also commits the EU to 'promoting fairness and openness in sporting competitions'. There are only fair UEFA competitions with the existence of economic criteria as performance criteria that guarantee that the competitions are regular, unfolding with the same number of participants all the time, without clubs pulling out as a result of an inability to support the costs or with insufficient financing. The logic of the FFP and its BER is precisely the following: to avoid it coming about that an economic imbalance between clubs that compete in the same UEFA competitions becomes a competitive imbalance that jeopardises the fair nature of the competition. 'Competitors must have equal opportunities, not only at a purely sporting level but at an economic level as well'⁷. It will be difficult for the Commission or - if called to judge the matter, for the EU courts - to contradict a mission committed to by the EU and which could be followed up by an instrument like the FFP⁸.

Soft law instruments enacted by the EU institutions

Further to the objectives listed in Article 2 (2) of the FFP⁹ - which

eloquently demonstrate the ratio of the legislator - that of us properly adhering to what the various EU institutions have already expressly sustained with respect to the FFP and the previous licensing system, which had identical aims. Let's begin with the European Commission. The Vice President Joaquim Almunia, in a Joint Statement with UEFA President Michel Platini¹⁰, underlined that the BER 'reflects a sound economic principle that will encourage greater rationality and discipline in club finances and, in so doing, will help to protect the wider interests of football'. In turn, the Commissioner M. Barnier¹¹ drew attention to the 'self regulatory measures taken by the football sector to reduce the overall debt of clubs'. In addition, a recent communication from the Commission¹² affirms that 'club licensing systems offer a valuable tool to ensure the integrity of competitions' and that the Commission 'welcomes the adoption of measures aimed at enhancing financial fair play in European football'.

The Commission, in the White Paper on Sport¹³, sustains that the 'legitimate objectives' of sporting rules are normally related to the 'organisation and proper conduct of competitive sport' and may include, for instance 'the ensuring of financial stability of sports clubs/teams'. In turn, the European Parliament, in a recent resolution in the wake of the Disas Report¹⁴, 'clearly states its support for licensing systems and financial fair play, as they encourage clubs to compete within their actual financial means'. A few years ago, the European Parliament - regarding UEFA's licensing system - affirmed that '[i]t is self-evident that these kinds of rules derive from a need inherent in the organization of competitions.

Competitions cannot be free to all. The justification for these 'entry barriers' in the sports industries lies in the unique pyramid sports' structure and the required competitive balance among competitors.¹⁵ Furthermore, the objectives of 'financial transparency and proper management' were alluded to¹⁶.

EU case law

In the Delière ruling¹⁷, the Court of Justice of the European Union (CJEU) considered an eligibility rule to a sports competition and its compatibility with the free provisions of services:

'The adoption, for the purposes of an international sports tournament, of one system for selecting participants rather than another must be based on a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organisation and the financing of the sport concerned'. Now, *mutatis mutandis*, where you read 'international sports tournament' you can read UEFA competitions, in which the framework of the organisation and of the financing for football through the FFP can justify a restriction to a fundamental freedom, namely the free provisions of services.

Also, the Piau¹⁸ and Meca-Medina¹⁹ rulings should underpin the analysis of the compatibility of the FFP with EU Law, owing to some similarities in their rulings - firstly because it also adhered to the international federative rules of eligibility based on financial criteria; secondly because it focused on federative access rules and staying in a sports competition based on the safeguarding of the integrity of the competition. In either case, the existing restrictions of EU Law were justified.

The ENIC²⁰ case must also be



Alexandre Mestre

remembered - rules were also at issue aiming to preserve the integrity of the UEFA competitions in order to ensure the uncertainty of the results and consequently to give the public a correct perception of the integrity of UEFA competitions. The Commission considered that the competition rules of the Treaty did not even apply in this case.

Miscellaneous

Study: The Economic and Legal Aspects of the Transfer of Players, January 2013²¹

It recommends to '[m]aintain the uncertainty of sports results through better financial accountability and redistribution mechanisms, rewarding excellence as a matter of priority independent of financial strength²² and proposes to '[s]upport the implementation of Financial Fair Play (FFP) rules as an instrument to prevent clubs from financing their position in the transfer market and their sporting results through unacceptable debt levels²³.

The current context of the crisis in European football

In the European Parliament²⁴ regarding salary caps, the following has been said: '[a]n environment of economic crisis in football would make salary caps more likely to survive legal challenge. In this environment, salary caps may be justified on the grounds that they maintain the economic viability of teams competing in the league.' Now, *mutatis mutandis*, the rationale applied to salary caps must be worthwhile for the FFP and for the BER, as much for those invoking that FFP mainly cuts wage costs and taking into account the crisis in European football being more serious than before. Moreover, it can even be sustained that mechanisms like the FFP fill a 'vacuum regarding the financial

regulation²⁵ in light of the current crisis.

Recent case law of the Court of Arbitration for Sport

In two recent rulings²⁶, the validity of FFP was not questioned and the Panel even noted 'how seriously UEFA considers significant breaches' of the regulations.

The protection and benefits of the consumers

We may consider the words of the UEFA President, Michel Platini: "I have been deeply convinced, since the start, that a club should not spend more money than it generates.... You, we, the fans and football lovers, have no interest in seeing clubs, the real heritage of European football, disappear due to risky management"²⁷. As UEFA's competitions are a collective and indivisible product, whose consumers are football fans, the existence of the FFP is fundamental so that such specified consumers believe in the product, can be spectators with passion and emotion, never sure of the result and fully confident that whoever competes has the necessary conditions to stay in the competition from the beginning to the end, unaffected by economic mishaps through excessive costs, in a context of equality of forces. Competition can only develop within a 'precise' framework with 'rigid membership rules'²⁸ and, 'bearing in mind the specificities of the sports production process, so that the sports competition between the clubs may be as open as possible, the economic competition must be within as narrow a framework as possible'²⁹.

FFP is the least restrictive means of achieving UEFA aims

● FFP is a deepening and extension of the licensing system, coming about after the due

maturation practice of some existing *lacunae*. It was approved through a consensus between club and player representatives³⁰. Therefore, either we sustain that no stakeholder wanted or was capable of finding a less restrictive means than the FFP or - and I include myself in this stance - the FFP was considered by everyone as the most necessary and adequate means to carry out the identified objectives; ● Certain expenditure is excluded from the break-even calculations, namely youth development programmes³¹, since these are considered to be beneficial to the long-term sustainability and the revenue-generation abilities of the clubs. But what is fundamental to preserve is that in designing the BER, the legislator prioritised the safeguarding of the superior interests of football: in some cases it is only possible through restrictive measures and in other cases through the non-application of restrictive measures. Here, there is therefore a discretionary decision to be made, through pondering the balancing interests and proportionality.

This is our modest contribution. Many more arguments will arise, either way, in a case that promotes enriching the binomial Sport/EU law.

Alexandre Miguel Mestre Of Counsel AAMM, Abecasis, Azoia, Moura Marques & Associados, Law Firm, Lisbon Former Portuguese Secretary of State for Sport and Youth amm@aamm.pt

1. See <http://online.wsj.com/article/SB10001424127887324077704578357992271428024.html> and www.soccernomics-agency.com/?p=454, accessed 28 June 2013.

2. See, *inter alia*, different legal and economic articles and presentations published on the internet by Andrew Nixon; Ben Van Rompuy; Christopher A. Flangen; Daniel Geey; Henning Vöpel; Holger Preuss & Mathias Schubert & Kjetil K. Hargen; Thomas Peeters &

From Article 165 TFEU we recognise a specificity of football and even a specificity of professional football, which demands a mitigated application of EU law

Stefan Szymanski; and Stephen Weatherhill.

3. The concept of the BER is simple: clubs must not spend more than they earn over a stipulated time frame. The provisions for this are found in Article 58 of the UEFA FFP as summarised in Annex X: 'The break-even result for a reporting period is calculated as relevant income less relevant expenses'.
4. ECJ Judgment of 19 February 2002, Case C-309/99, ECR 2002, page I-1577.
5. Opinion delivered on 16 July 2009, Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC, Case C-25/08, ECR 2010.
6. CJEU Judgment of 16 March 2010, Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC, Case C-325/08, ECR 2010, p. I-2177.
7. François Mandin, 'La soumission de la norme sportive au droit communautaire', Dalloz Collection, 1998, 3rd book, p. 32.
8. According to a report of the French Senate, equity and fairness in sport competitions can be achieved by any initiative that leads to the reinforcement of the demands related to good management of professional clubs - see 'Sénat, Session Ordinaire 2012-2013, n. 379, Rapport d'information fait au nom de la commission des affaires européennes sur l'Union européenne et le sport professionnel', by Jean-François Humbert, p. 41.
9. To improve the economic and financial capability of the clubs, increasing their transparency and credibility; to place the necessary importance on the protection of creditors by ensuring that clubs settle their liabilities with players, social/tax authorities and other clubs punctually; to introduce more discipline and rationality in club football finances.
10. 'State aid: Vice President Almunia and UEFA President Platini confirm Financial Fair-Play rules in professional football are in line with EU state aid policy', 21.03.2012, IP/12/264.
11. Answer to written question, 9 August 2010, www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-4628&language=SV, accessed 27 June 2013.
12. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Developing the European Dimension in Sport', Brussels, 18.1.2011 COM(2011) 12 final', '4.5. Integrity of sporting competitions'.
13. See 2.1.5.
14. Report on 'the European dimension in sport' (2011/2087 (IN)), Committee on Culture and Education, Rapporteur: Santiago Disas Ayxela, 18.11.2011, A7-0385/2011.

15. European Parliament resolution of 29 March 2007 on 'the future of professional football in Europe' (2006/2130(INI)), paragraph 20.
16. The Committee of the Regions also welcomes FFP - see 'Opinion of the Committee of the Regions on 'Developing the European dimension of sport' (2012/C 9/14), OJEU C 9/74 11.01.2012.
17. CJEU judgment of 11 April 2000, Joined cases C-51/96 and C-191/97, European Court reports 2000, p. I-02549.
18. CJEU judgment of 12 April 2005, Case C-265/03, ECR, 2005, p. I-2579.
19. CJEU judgment of 18 July 2006, Case C-519/04 P, OJ C 224 of 16 September 2006, p. 8.
20. COMP 37.806 ENIC/UEFA, IP/02/942, 27 June 2002.
21. <http://ec.europa.eu/sport/library/documents/f-studies/study-transfers-final-rpt.pdf>, accessed 27 June 2013.
22. Page 253.
23. Page 256.
24. Working Paper, op. cit.
25. Alen Odriozola, 'El deporte profesional y las reglas de mercado. Competencia, ayudas de Estado y libertades comunitarias', in 'El deporte profesional', Edited by Alberto Palomer Olmeda and Ramón Terol Gómez, Madrid, Bosch, 2009, p. 549.
26. CAS 2012/A/2824 Besiktas JK v UEFA, 16 October 2002; Malaga Case - [www.tas-cas.org/d2wfiles/document/6818/5048/0/2013.06.1120Media20Release20\(English\).pdf](http://www.tas-cas.org/d2wfiles/document/6818/5048/0/2013.06.1120Media20Release20(English).pdf), accessed 27 June 2013
27. 'Financial Fair Play ensures football's stability (UEFA)', www.uefa.com/uefa/video/videoid=1585436.html?%20autoplay=true, accessed 27 May 2013.
28. Jacques Fontanel and Liliane Bensahel, 'Réflexions sur l'économie du sport', Presses Universitaires de Grenoble, 2001, p. 57.
29. Jean-François Bourg, 'L'économie du sport', in 'Le Sport en France. Une approche politique, économique et sociale', Directed by Pierre Arnaud, 'Les Études de La Documentation Française, 2000', p. 125.
30. It obtained unanimity at UEFA's Executive Committee, it received public support from the European Club Association and player organisation FIFPro also strove to defend the rules in question.
31. The investment in the training of young footballers brings us back to paragraph 106 of the Bosman ruling: 'the recruitment and training of young players must be accepted as legitimate'.